

To

Rev. W. D. D. D.

OBSERVATIONS

Upon a BILL, entitled,

An Act for taking away, and abolishing the heritable Jurisdictions in that Part of Great Britain called Scotland, and for restoring such Jurisdictions to the Crown; and for making more effectual Provision for the Administration of Justice throughout that Part of the united Kingdom, by the King's Courts and Judges there; and for rendering the Union more complete;

OBS. I. That the abolishing heritable Jurisdictions and Offices of Inheritance, instead of compleating the Union, will tend to dissolve it, and that the restoring them to the Crown is against our Constitution.

II. That no Equivalent or Satisfaction in Money can be assessed or accepted of for the Jurisdictions in question.

III. That the Regulations touching Sheriff and Steward-deputes, and the Courts, and the inhibiting Advocations from them, are attended with Inconveniencies.

IV. That to raise and discuss Suspensions before the Circuit Courts is inept, not answering the Design, and against the Treaty of Union.

V. That an Attempt to introduce a Conformity betwixt our Circuit Courts, as to Cognizance in Civil Matters, and the Assizes or Commissions of *nisi prius* in England is vain, and against our Constitution.

VI. That the Tendency of this Bill is to undermine the *British* Constitution, and advance the *Jacobite* Interest.

Minime sunt mutanda, quæ interpretationem certam semper habuerunt,

L. 23. II. DE LEGIBUS.

E D I N B U R G H,

Printed in the Year, M.DCC.XLVII.

1900

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1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

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OBSERVATIONS upon a BILL, ENTITLED,

An Act for taking away, and abolishing the heritable Jurisdictions in that Part of Great Britain called Scotland, and for restoring such Jurisdictions to the Crown; and for making more effectual Provision for the Administration of Justice throughout that Part of the united Kingdom, by the King's Courts and Judges there; and for rendering the Union more complete.

OBSERVATION I.

That the abolishing heritable Jurisdictions and Offices of Inheritance, instead of compleating the Union, will tend to dissolve it, and that the restoring them to the Crown is against our Constitution.

BY this Bill, “ all heritable Powers and
“ Jurisdictions of Justiciary, and all Re-
“ galities and heritable Bailleries in Scot-
“ land, are proposed to be abrogated and extin-
“ guished, and the Jurisdictions, Powers and
“ Autho-

" Authorities belonging to them, to be vested
 " in, and exercised by the Court of Session,
 " Court of Justiciary, the Judges in the Cir-
 " cuits, and the Sheriff and Steward-courts, in
 " the same Manner, as if such Justiciaries, Re-
 " galities or Bailleries had never been granted."

And by another Clause, " all Sheriffships and
 " Stewartries granted unto, or possessed by any
 " Subject in *Scotland*, either heritably or for
 " Life, and all Jurisdictions, Authorities and
 " Privileges thereunto belonging, *are to be re-*
 " sumed and annexed to the Crown."

And by a 3d Clause, " No Heritor or Pro-
 " prietor of Lands, which have been erected in-
 " to a Barony, or granted with other lower Ju-
 " risdiction, shall by Virtue thereof have, or
 " exercise any Jurisdiction whatsoever, Crimi-
 " nal or Civil, other than for recovering the
 " Rents and Profits of the Lands from the Te-
 " nants and Possessors thereof, and all other
 " Powers, Jurisdictions or Authorities, that
 " may have heretofore been claimed or exerci-
 " sed by any such Heritor or Proprietor, shall
 " be abrogated and discharged."

By the same Bill it is provided, " That rea-
 " sonable and just Compensation and Satisfacti-
 " on be made for, and in respect of every such
 " Justiciary, Regality, Sheriffship, Stewartry
 " and Bailliary, and for the Jurisdiction of a Ba-
 " rony, or other Jurisdiction taken away, dis-
 " solved and abolished, or resumed or annexed
 " to

“ to the Crown, to all Persons who shall be
 “ found to be lawfully possessed of the same,
 “ and for that End they may enter their Claims
 “ respectively before the Court of Session, who
 “ are in a summary Way to examine their Titles
 “ to the same, and determine the Value there-
 “ of.”

In the Title and Preamble of this Bill, it is
 said to be intended *for rendering the Union more
 complete.* Now, so far as concerns the abolish-
 ing Jurisdictions and Offices of Inheritance, it is
 manifestly a Breach of the 20th Article of the
 Union, which reserves *all heritable Offices, he-
 ritable Jurisdictions, Offices for Life, and Ju-
 risdictions for Life to the Owners thereof, as
 Rights of Property, in the same Manner as they
 were enjoyed by the Laws of Scotland at the
 Time of the Union, notwithstanding the Treaty;*
 how then can this tend to render the Union
 more complete, when it is a direct Violation
 of it?

In the next Place, the Jurisdictions of *Coun-
 ties Palatine, Manours,* and other *Franchises* in
England are preserved entire. The Jurisdicti-
 on, Power and Privileges of Counties Palatine,
 are much higher than these of our Justiciaries
 or Regalities belonging to the Subjects of *Scot-
 land,* and the Powers, Authorities and Privi-
 leges of Lords of Manours, are likewise more
 eminent than those of our Barons: The Lords
 of Manours had the Franchise of *infang Thief*
 and

and *outfang Thief*, to be heard and determined in their Courts Baron, but these are now antiquated; and in the same Manner, these Powers of old competent to our Barons, (commonly called with us Powers of *Pit* and *Gallows*) are gone in Disuse, so that in this Respect they are upon the same Footing.

But still the Lords of Manors have Authority and Jurisdiction, not only in punishing Offences and Misdemeanors committed within their Precincts, but likewise in deciding Controversies about the Title of Copy-hold Lands within their Bounds, where they may redress Matters as a Chancellor in Equity (*a.*) This last Jurisdiction never belonged to our Barons, nor even to Lords of Regalities; they cannot determine in any Competition of Rights betwixt their Vassals. All Competitions about heretable Subjects, or Rights of Inheritance, are peculiar to the Court of Session by our Law: These and other Privileges belong to Lords of Manors in *England*; and many more to these vested in Counties Palatine.

How can it render the Union more compleat to abolish our Jurisdictions and Privileges, which are expressly secured by the Union, and leave these in *England*, which are more eminent, intire and inviolate, though they are not expressly reserved by the Union? Is not this to make a Distinction betwixt the Subjects of *North Britain*

(*a.*) Littlel. Sect. 58 et 59. et ibid. Coke.

tain possessed of these Jurisdictions, and these in *England* possessed of greater? Theirs are secured only by the Common Law, as it stood before the Union, ours have the additional Security by the Union; and yet ours shall be abrogated, and theirs preserved! This would not only seem to be making a Jest of the Article of the Union securing our Rights, but likewise to make a signal Difference betwixt us and our Fellow-subjects in *South Britain*, to our Prejudice. If a Breach of the Union tends to compleat it, then this Bill will have that Effect; but till Contradictions in Terms can be consistent, this Bill cannot be compatible with the Union, and much less compleat it.

It is further set forth in the Preamble of the Bill, *That it is intended for restoring to the Crown the Powers of Jurisdiction originally and properly belonging thereto, according to the Constitution.* There is no Doubt all Jurisdiction originally proceeded from the Crown; but after it is duly granted to the Subjects vested therein as Part of their Inheritance, they can no more be outed of it than of any other Rights of Property belonging to them. Of this Nature are all those heretable Jurisdictions against which this Bill strikes; and any Infringement of them is inconsistent with our Constitution as it was before the Union, and much more now, since they are secured thereby as Rights of Property.

Rights of these Jurisdictions were granted some Ages ago. Thus Regulations are made touching the Lords of Regalities, *viz.* the Manner of exercising that Jurisdiction by their Bailles; and it is provided (*a*), "That in case the
 " Lords of Regality do not their Duty, in punishing their Baillies who shall be found culpable, they shall be challenged before the
 " King therefore, upon Pain of Forfeiture of their Lands and Privilege of Regality;" and Orders are made touching Baillies of Regalities their Conduct in relation to Malefactors within their Bounds (*b*). Again, it is statuted, "That
 " Lords having Regalities shall hold *Justice Eyres* twice in the Year, in the same Manner as the King's Justiciar (*c*)."

Thus Regalities were in great Number upwards of 300 Years ago authorised by the Law; and 'tis highly probable few or none have been granted since the Date of the Statute (*d*), which ordains, *That in Times thereafter no Regalities be granted without Deliberance of Parliament*; or if any such are, they have had the Consent of the Parliament in terms of the Statute: How then can they be resumed at this Day by the Crown, even though they had not had the solemn Sanction of the Union? for their Security is the same.

(*a*) Statute Rob. II. cap. 14. anno 1371. (*b*) Dit. Stat. cap. 16. (*c*) Stat. Rob. III. cap. 30. cap. 33. anno 1400. (*d*) Parl. 1455. cap. 43.

same which founds the *British* Constitution itself.

Some Regalities have been granted many Centuries before the foresaid Periods, and for most just and reasonable Considerations. Thus the first Regality we read of was that erected by *Malcolm III.* called *Cannore*, in favours of *MacDuff* Earl of *Fyfe*, for his signal Service in de-throning the Usurper *MacBeth*, and restoring King *Malcolm* to the Throne of his Ancestors. This is described by the Historian as importing the very same Privileges that belong to the Lords of Regalities at this Day (a).

Heretable Sheriffships are of the same standing, and have the same Security for their Rights as Lords of Regality have for theirs; and as Lords of Regality cannot exercise their Jurisdiction otherways than by Baillies, so Sheriffs that have the Office in Fee, and are not sufficient to minister Justice in their own Persons, are bound to constitute Deputes capable of the Office, for whom they shall be answerable; who must be *Persons of Substance, of good Fame, Knowledge and Experience* (b).

The Bill ordains, "That no Sheriffship or Stewartry shall at any time hereafter be granted to any Person either heritably or for Life." I observe, on this Head, that our Convention of Estates 1689 (c), in their Declaration,

(a) Boet. lib. 12. p. 256. anno 1057. (b) Parl. 1424. cap. 6. Parl. 1549. cap. 73. (c) Cap. 13.

ration, containing the Claim of Right, mention this as one among many other Instances of King *James* his exercising arbitrary Power, whereby he had forfeited his Right to the Crown, viz. " his changing the Nature of the Judges Gifts " *ad vitam aut culpam*, and giving them Com- " missions *ad beneplacitum*, to dispose them to " Compliance with arbitrary Courses." Now 'tis pretty extraordinary, that by this Bill it is intended, that the above Grievance should be so far from being redressed, that it shall be put out of his Majesty's Power to give any Remedy to it; and, for certain, it is vastly more for the Liberty of the Subjects, and contributes to the free Administration of Justice, that Judges be appointed *quamdiu se bene gesserint*, that, being under no Apprehensions of Removal, but upon real Maleverſation, they may proceed in the Exercise of their Office, as the Law and a good Conscience direct.

And as to the Power of Barons, it is coeval with the Introduction of the Feudal Law into this Country, which, I doubt not, took Place with us, on *Fergus* the Second's recovering the Throne of his Ancestors, after they and their Countrymen had suffered an Exile of 44 Years in *Denmark*; for, as our Historians inform us, he, with an Army of *Picts* and *Danes*, assisted *Alaricus* in his Wars in *Italy*, when he sacked and took Possession of *Rome*, and the whole *Roman* Provinces in these Parts, and divided the

the conquered Lands among his Followers, on Condition of Fealty and military Service by a Feudal Tenure with ample Privileges.

After this successful Expedition, *Fergus* returned to his kind Friend the King of *Denmark*, whose near Kinsman he was by his Father *Ertus*, a *Danish* Prince, to whom his Mother, the Heiress to the Crown of *Scotland*, was married. And soon thereafter, on earnest Invitation from the *Picts*, to assist them against the *Britons*, he came over with all the *Scots* that were in these Parts; and such of the *Danes* as were willing to follow his Fortune. Upon getting from the *Picts* Possession of their ancient *Scottish* Kingdom, *Fergus* parcelled out the same among his Followers (a), after the Example of *Alarick*, in respect to the conquered Countries in *Italy*, on Condition of Homage and Fealty, and to be holden as Fiefs of him.

In the same Manner the *English* Lawyers, in the accounting for the Institution of Courts Baron inform us (b), " That, by the Laws and
 " Ordinances of ancient Kings, especially of
 " King *Alfred*, it appeareth that the first Kings
 " of the Realm had all the Lands of *England*
 " in *Demean*, that they reserved to themselves
 " the great Manours and Royalties, and, of the
 " Remanent, they, for the Defence of the
 " Realm,

(a) *Boet. Lib. 7. p. 114. et seqq.* (b) *Littlet. Cap. 9. Sect. 73. et ibid. Coke.*

“ Realm, infeofed the Barons with fuch Jurif-
 “ dictions, as the Court Barons now have.

Wherefore, if 'tis good Ground for abolifh-
 ing the hereditary Jurifdictions, and refuming
 Offices of Inheritance, that they proceeded from
 the Crown; then, by the fame Reason, all
 Rights of Property in Land belonging to the
 Subject, either in this Country or *England*,
 may be refumed, it being moft certain, that
 they all flowed originally from the Crown: A
 Demonftration of this (*whether the foresaid Ac-*
count of the Matter fhall hold or not) is, That
 they all hold of the Crown, either mediately or
 immediately at this Day, and are eftablifhed by
 Charters from the Crown; and, to be fure, the
 King could not have conveyed them by his
 Grants, whereon thefe Charters proceed, unlefs
 the fame had belonged to his Majefty.

O B S E R V. II.

*That no Equivalent or Satisfaction in Money
 can be affeffed or accepted of for the Jurif-*
dictions in Queftion.

AS to a reasonable Satisfaction or Compem-
 fation, which the Bill propofes fhall be given
 for thefe Jurifdictions and Privileges, it would
 feem impoffible, that any fuch Measure can be
 followed without the Consent of the Persons in-
 terested, by fubmitting their Rights to be difpofed
 of in that Way; for otherwife, may not we of
 North

(13)
North Britain be outed of all our Lands, on Pretence of an Equivalent in Money, for we have no better Security for the one than the other? And thus no *Scotsman*, by this Rule, may have a Foot of Ground in his native Country, if the Scheme in the Bill shall be pursued.

There is indeed this Difference from the Nature of Things, that the Rate and Value of Land is known; whereas Honour, Jurisdiction, Franchise or Privilege, cannot admit of any Value, in a proper Sense: 'Tis like Life and Liberty, which the Law Terms *res inestimabiles*, Things inestimable. These afford no yearly Profits, but are most Important, and highly esteemed by all generous and ingenuous Souls, tho' they can admit of no pecuniary Value; they raise one above the State of the Yeomanry and common People, and gain him Authority and Grandeur, which procure Respect and Esteem; and by suppressing these Jurisdictions, the highest Dukes with us are brought upon a Level with their meanest Vassals or Feuers of the Rank of Yeomanry: For, by this Bill, their Power and Authority is equal in every Respect, and at the same time the great Men in *England*, Lords of Manors, and those vested with Counties Palatine, shall bruik and enjoy their Honours, Franchises and Privileges as formerly: This were forfeiting our Nobility and Gentry of their Birth-Right, and using them arbitrarily by such Debasement, under a
free

free Government. If *Eſau* is juſtly cenſured as a *prophane Perſon* for ſelling his Birth-Right for a Morſel of Meat, as the great Apoſtle Characterizes him (a) ? muſt our Nobility and Gentry, be compelled to ſell theirs for a Piece of Money? Wherefore, 'tis hop'd, the Wiſdom of the Parliament will not liſten to ſuch injurious and dangerous Meaſures.

The People in *England* are at Liberty to apply to their Courts-Baron, for Deciſion of their trivial Differences, and the Lords of the Manors have Jurisdiction to puniſh Riots and Miſdemeanours within their Precincts, for the quiet of the Country; all this may be done at little Expence and Trouble. We have at preſent the ſame Privileges; but, by the purview of this Bill, our Tenants and Poſſeſſors ſhall be obliged to apply to the Sheriff-Courts for Juſtice in every little Claim or Demand, at their great Expence and Trouble; and our Lords of Regality, and Barons, muſt likewiſe have Recourſe to the ſame Courts for puniſhing any Crimes or Miſdemeanours, that ſhall happen within their Bounds. This certainly is not to facilitate, but manifeſtly to obſtruct the Adminiſtration of Juſtice among us; and why ought this Hardſhip to be impoſed upon us by the *British* Parliament, which is the Guardian of the Rights and Liberties of all the *British* Subjects? Why muſt our Privileges be aboliſhed?

(a) Heb. xii. 16.

shed, and theirs in *England* remain inviolate? Can any pretended Equivalent in Money be a reasonable Satisfaction for the Honour and Dignity accompanying these Jurisdictions? Among private Persons, it would be lookt upon as a high Indignity and Affront, to make the Proposal; and none but Persons in the utmost Straits would accept of such dishonourable Barter.

'Tis the Interest of all *British* Subjects to concern themselves in this Question: The Consequences may be dreadful. The *British* Constitution can no longer be safe and firm, if the Union upon which it is founded is shaken; so that all our Rights and Liberties, sacred and civil, must hang in Suspense, while this Bill is in Dependence; and therefore 'tis hoped that such a bold Attack on them shall be prevented, by not allowing it to be presented. 'Tis dangerous to bring such Points in Question, as if it were a Matter of Deliberation and Dispute, whether our *British* Constitution shall be maintained inviolate or broke through? Or, whether our Rights and Liberties shall be supported under our happy Constitution; or, if they shall be infringed and quite abolished?

If indeed these Jurisdictions had been the Occasion of the late unhappy Rebellion; or, of the former in the 1715, or, had in the least contributed to the same, there would be good Reason for taking them away; even perhaps without any Récompense; for then it would
be

be necessary for the Good of our Constitution, *et salus populi suprema lex*. But, it has been abundantly shewn in a late Essay, (a) that they have not the least Tendency that Way, but, on the contrary, that they rather contribute to the quelling Rebellions, than fomenting them: It is the Clanship in the Highlands, to which any Thing of that Kind is owing, as that Author has fully evinced.

I shall only add, that all those possessors of high Jurisdictions in the Highlands, are Friends to the Government, and the suppressing their Power and Authority, shall disable them for ever from being serviceable in quashing Insurrections or Rebellions in these Parts; so that if these lawless Associations of Clans created Disturbances to the Government formerly, they shall have it much more in their Power, if these Jurisdictions are removed, which if duly encouraged might be most useful to curb and suppress them: Wherefore, instead of abolishing these Jurisdictions, they ought to be strengthened by Powers of Lieutenancy in the Bounds of the Highlands and Islands of Scotland for the more effectual maintaining of the publick Peace.

Sheriffs for most Part, are not Men of that Consequence and Authority, as these powerful Lords of Regality; and therefore not so capable

(a) Essay upon Feudal Holdings, Superiorities and Jurisdictions, printed this same Year, 1747.

pable to suppress Seditions and Commotions of the People, more especially when deprived of the Assistance of these Lords and Barons, who, in the present State, may, and ought to concur, for preserving the publick Peace and Quiet of the Country, under the auspicious Reign of our most gracious Sovereign. His Majesty is the great Protector of our Rights and Liberties, and would not, I presume, from the great regard he has to Honour and Justice, according to his known Character, suffer them to be infringed, even tho' we should be disposed to throw them up, as the Promoters of this Bill seem inclined.

And this leads me to observe, that I strongly suspect a Jacobite Plot in projecting this Bill; the Plan seems to be to create Animosities and Disaffection against the Government, to infuse Jealousies in the Breasts of the Friends of the Government, and to make these that are not zealously affected, entirely Enemies to the present happy Constitution: Its Tendency must be to give all true *Scots* Men an Abhorrence at the Union, when under it their Rights and Liberties shall be destroyed and extinguished, instead of being preserved and secured, as they had ground to expect from the Nature of the Treaty, and the express Stipulations in it. These direful Effects, 'tis hoped, the Wisdom of the Nation will prevent, by treating this Bill as it deserves, and not to regard it so much as

to allow the same a Hearing ; for indeed the Proposal of an Equivalent adds Dishonour and Affront to the Injury intended by it, as if we were disposed to part with an Honour, Dignity and Pre-eminence, scandalously, for a Consideration in Money.

OBSERV. III.

That the Regulations touching Sheriff and Steward-deputes, and their Courts, and the inhibiting Advocations from them, are attended with Inconveniencies.

I Shall now proceed to make some few Observations upon the rest of the Bill, most of the Law-suits that are brought before Courts of Regalities and Baronies, must, on the Foot of this Bill, come before the Sheriff and Steward Courts ; and the Bill sets forth, “ That it is reasonable, that some further Regulation be made relating to the Number, Qualifications and Appointments of Sheriff-deputes and Steward-deputes in Scotland ;” and therefore provides, “ That it shall be lawful for his Majesty to direct how many Sheriff-deputes or Steward-deputes shall be appointed for any County, Shire or Stewartry, Regard being had to the Extent of the same, and that one Sheriff-depute, an Advocate of Years standing, shall be nominate by his Majesty, and that the other Deputes shall be appointed

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" ed by the principal Sheriff or Steward whom
 " the King may disapprove, and that his Maje-
 " sty may appoint the same Person, being an
 " Advocate, to be Depute for Counties,
 " Shires or Stewartries, being adjacent to each
 " other."

The Multiplicity of Business that shall come
 before these Courts on this new Plan, requires,
 perhaps, that more Deputes be appointed to o-
 vertake it. Now, whereas one of them only is
 to be an Advocate, who is presumed to under-
 stand the Law, and capable to dispense Justice
 to the Lieges in a right Manner, what shall be
 the Condition of these within the Districts of the
 other Depute, that have no Dependence on the
 Depute Advocate? Is he bound to give Direc-
 tions to his Collegues in their Procedure, or are
 they bound to observe them? And if such Ad-
 vocate Depute shall be nominate to more Shires,
 he can only be of Use within his own District,
 unless he shall have the Supervising and Con-
 troul of the Proceedings of all the Sheriffs prin-
 cipal, and their other Deputes, which is not in-
 tended by the Bill.

The Bill, in order to the Sheriff and Steward
 Courts being rendered more useful and bene-
 ficial to the Subjects in *Scotland*, ordains, " That
 " no Advocation shall be granted or allowed in
 " any Action brought before them, for any
 " Sum of Money, or other personal Demand,
 " not exceeding the Value of 30 *l. Sterl.* and all
 " such

“ such Letters or Proceſs of Advocation are inhibited and diſcharged.”

At preſent, all Advocations of Cauſes under 200 Merks, or 11 *l.* 2 *s.* 2 $\frac{2}{3}$ *d.* *Sterl.* are diſcharged; but at the ſame Time, even in theſe petty Actions, a Bill of Advocation may be preſented to the Lord Ordinary on the Bills, complaining of wrong Interlocutory-Judgments given by the inferior Judges, in order to have the Cauſes remitted to them, with Inſtructions to rectify and direct their Proceedings; and if the Party is not ſatisfied with the Ordinary's Judgment, he may have the joint Opinion of three Lords in Vacation Time, and of the whole Lords in Time of Seſſion. This Remedy may be obtained on very little Expence, and the Proceeding is in a moſt ſummary Way. This Method is a Check to the Conduct of inferior Judges, and their Decrees, given after ſuch Precautions, may be ſo juſt, as not to be in Hazard by a Suspension or Reduction; whereas, by this Bill, the Lieges ſhall be left to theſe laſt mentioned Remedies, which are more expenſive and dilatory than Advocations in Matters within 30 *l.* *Sterl.* and, after all the Courſe projected, cannot be effectual.

O B S E R V. IV.

That the Proposal to raise and discuss Suspensions before the Circuit Courts is inept, not answering the Design, and against the Treaty of Union.

THE Remedy proposed is, " That it shall
 " be lawful for any Party conceiving him-
 " self aggrieved by any Decree or Judgment of
 " the Sheriff or Steward Courts, to seek Relief
 " of the same by Bill of Suspension, to be pre-
 " ferred to the Circuit Courts of such County
 " or Stewartry ; and thereupon it shall be law-
 " ful for the said Circuit Court to ordain Let-
 " ters of Suspension to be issued, and to hear
 " and determine thereon by the like Rules of
 " Law and Justice, as the Court of Session may
 " now cognosce and determine Suspensions of
 " Decrees of the Steward or Sheriff Courts in a
 " summary Way; and in case the Reasons of
 " Suspension are found not to be relevant, or
 " not instructed, they shall condemn the De-
 " fender in the full Costs of Suit to the other
 " Party ; and in case such Bill of Suspension
 " shall be brought in the Interval of the Circuit
 " Court, the same shall be preferred to the
 " Judge or Judges who went that Circuit,
 " wherein the Circuit pronouncing the Decree
 " was held, and the same shall be determined
 " at the next Circuit."

By

By another Clause the Bill ordains, " Circuit
 " Courts to be held twice in the Year, and that
 " they shall continue at each Town where they
 " shall be held Days for the Dispatch of
 " Business."

It likewise provides, " That, in case the Cir-
 " cuit Courts in cognoscing upon any Suspen-
 " sion shall find Difficulty, and not otherwise,
 " it shall be lawful for such Circuit Court to
 " certify the same to the Court of Session, which
 " is to determine the same in like Manner, as
 " if the Suspension had been originally com-
 " menced in the Court of Session."

I observe, upon this Head, 1. That this pro-
 posed Expedient cannot answer the Design.
 2. That it is against the 19th Article of the
 Union.

As to the *First*, The Design, in Appearance,
 is to contribute to the Ease of the Lieges in ob-
 taining Justice, and to the Dispatch of it in the
 Method of Procedure. Now, when a Bill of
 Suspension is presented, the Charger (*as we call*
the Plaintiff) must be allowed to see and an-
 swer the same. This will require some Days;
 and then, upon advising the Bill and Answers,
 the Bill is either refused or past; if the first,
 the Suspender has no Remedy; whereas, were
 it before the Court of Session, when a Bill is
 refused by the Lord Ordinary on the Bills,
 the Suspender may resort to three Lords in
 Time of Vacation, and to the whole Lords in
 Session-

Session-time. It is a Hardship upon the Party to be deprived of this Remedy, since, by the Constitution he is entitled to the Judgment of the Court of Session, or of three Lords jointly in the Vacation-time.

Next, if the Bill is past, and Letters of Suspension issued, then there must be a limited Time for the Charger to compear with his Decree to have the Suspension discusst, which is for most Part a Month: Before Expiry of this Period, the Circuit Court is over, and the Charger must wait the next Circuit, before he can have Execution upon his Decree, notwithstanding that the Session interveens, before which, by the present Constitution, he might have the Suspension discussed; wherefore, by this new Model, Justice shall be greatly delayed, instead of being dispatched.

But further, where a Bill of Suspension is preferred in the Interval of the Circuit, it is to be determined at the next Circuit Court. Now, in the Interval of Circuits, the Court of Session is for the most Part sitting; and, by this Bill, it shall not be lawful for the Charger to have the Suspension discusst before that Court, but he must wait till the next Circuit. Thus put the Case, that a Suspension of a Sheriff or Steward's Decree is obtained the first of *November*, the Charger must wait till *May*, that the next Circuit is held, before he can obtain Justice; whereas, by the present Course of Procedure, he might have

have it done long before in a much surer Way before the Court of Session.

Again, the Case may happen, that the Judges of the next Circuit Court shall find Difficulty in discussing the Suspension; and therefore, in the Terms of the other Proviso, remit the same to the Court of Session, to be cognosced and determined: By this Means, the Charger shall undergo a new Delay and further Expence, before he can obtain Justice; so that instead of facilitating the Administration of Justice, and easing the Subjects of Expence and Trouble, they shall be exceedingly harrassed with Expences, Delays, and Multiplicity of Courts, through all which the Suitors must make their Way, before they can attain the Execution of Justice; whereas at present the Proceedings are more simple and easy, firm and solemn. If a Suspension is past, it may presently be determined by the Court of Session, no Allegations being admitted in such Cases, but these that are instantly verified or proved, and the Procedure is most summary.

There is this likewise in the Case, that the Clerk to the Bills, whose Office is for Life, is intitled to present all Bills of Suspension, and receive certain Dues upon that Account, he must therefore attend one of these Circuit Courts, and appoint Deputes to officiate for him in the other two Circuit Courts; and 'tis almost certain, that the Expence of the Journey and Attendance,

tendance, and a Consideration to the Deputes, must vastly exceed all the Perquisites of the Office, this were no small Grievance and Inconveniency to him ; but he, being in a publick Office, may be compelled to attend these new Courts, or to appoint others to officiate for him.

But the Writers to the Signet, whose Privilege it is to write and sign all Bills of Suspension, cannot be bound to give Attendance, and probably none of them would find their Account in it, for the Expence would exceed the Profit they could expect from such Undertaking ; and the same would be the Case of Advocates, all the Profits before the Circuit Courts could not afford them sufficient Encouragement to undergo such Employment ; so that unless Salaries were appointed to both Advocates and Writers to the Signet, in order to their officiating before the Circuit Courts, the Design must be frustrated.

There is this further Consideration, that the Clerks of the Session are intitled to all the Dues of Petitions and Extracts before that Court, in discussing Suspensions and Advocations, in the same Manner as in other Actions or Causes before them, and these are the only Fund for their Salaries ; by this Scheme they shall be defeated of the one Half of their Perquisites, which were a Kind of Forfeiture of them, notwithstanding their Offices are for Life, or *quamdiu se bene gesserint* ; and the same is the Case

of the Clerks to the Bills. Now, Offices for Life are reserved to these vested with them as Rights of Property by the 20th Article of the Union, in the same Manner as such Offices were possessed at that Time.

And this leads me to the second Observation upon this Head, *namely*, That this new projected Scheme is against the Articles of the Union. This holds not only in the Case just noticed, but likewise, which is more important, with respect to the Court of Session itself.

By the Treaty of Union it is ordained (a),
 “ That the Court of Session, or College of Ju-
 “ stice, do, after the Union, and notwithstan-
 “ ding thereof, remain in all Time coming
 “ within *Scotland*, as it is now constituted by
 “ the Laws of that Kingdom, and with the
 “ same Authority and Privileges as before the
 “ Union; subject nevertheless to such Regula-
 “ tions, for the better Administration of Ju-
 “ stice, as shall be made by the Parliament of
 “ *Great Britain*.” Now, according to the
 Constitution of the Court of Session, all Advoca-
 tions and Suspensions in Civil Cases, are an-
 nexed to its Jurisdiction, and consequently the
 Erection of this new Circuit Court, for prefer-
 ring and discussing Suspensions, is a Derogation
 to the Authority and Privileges of the Session.
 The Judges of the Circuit Court had never
 with us any Jurisdiction in Civil Matters; the
 Justice

(a) Article 19.

Justice Eyre, in place of which the Circuit comes, was originally constitute for Cognition and Trial only of Crimes (*a*), and to take Inspection of the Management of inferior Judges. For this Purpose, on the last Day of the Court they were to enter the Pannel, or abide Trial at the Suit of any Person that should make Complaints of them, and answer for their Administration of Justice; and the above is the only Power and Jurisdiction they have at this Day.

Wherefore, the vesting the Judges of the Circuit with a Jurisdiction in Civil Matters, is undoubtedly the Erection of a new Court; and whatever Authority or Jurisdiction is given to them in Cases Civil, is plainly by divesting the Court of Session of so much of that Authority and Jurisdiction, and annexing the same to these Judges: For, tho' they are of the Number of the Lords of Session, as well as Justiciary, yet they are to act by this new Scheme independently of the Court of Session.

By the same Rule the whole Jurisdiction that belongs to the Court of Session, may be taken from them, and annexed to some other Court of the King's Creation for *in toto et pars continetur* (*a*). If such Measure can be taken with respect to a Part of the Jurisdiction of the College of Justice, (and a considerable Branch too) may not the same be followed as to the whole? And
are

(*a*) Iter Justic. per totum Parl. 1587. cap. 28. Parl. 1671. cap. 16. (*b*) L. 113. ff. de reg. ju.

are not the People of *Scotland* intitled to have the Decrees before the inferior Courts against them cognosced and determined (in case of a Review) before the Court of Session, and not before any other Court, in the same Manner as if the Suits whereon such Decrees proceeded had been originally commenced before them? This were, therefore, a manifest Breach of the Constitution of the Court of Session, whose Authorities and Privileges are expressly secured by the Union, and to which all the Lieges are intitled to resort for Justice.

Nor can the *Proviso* subjoined in the Article support this Innovation ; for it concerns only Regulations for the better Administration of Justice in the Court of Session, but still the Court must be supported inviolate in its Authority and Privileges, and Justice must be administered by that Court accordingly, in all Causes that were annexed to their Jurisdiction at the Time of the Union. This is inconsistent with the vesting this new Jurisdiction in the Judges of the Circuit, to review the Decrees of inferior Judges independently of the Court of Session.

OBSERV. V.

That an Attempt to introduce a Conformity betwixt our Circuit Courts, as to Cognizance in Civil Matters, and the Assizes or Commissions of nisi prius in England, is vain, and against our Constitution.

TIS possible that the Framers of this Bill have had in their Eye the Course of Proceedings in *England*, upon Commissions or Writs called *nisi prius*, and as these were instituted for the Ease of the Subjects of *England*, and the speedy Administration of Justice in the Country, as their Lawyers inform us (a); so these Projectors perhaps imagined they were contributing to the same End by this Bill; if that were the Case, the Design were Praise-worthy, and beneficial to the People of *Scotland*.

But this is by no Means the Case, for the Course of Proceedings upon Writs of *nisi prius* before the Judges of Assize (to whom the Authority of Justices of *nisi prius* is annexed) in Civil Causes, touching which only the present Question occurs, is, that they must be grown to issue (*i. e.* the Suit contested, and the Fact ready to be tried) in the Courts of *Westminster*, and then they are brought down in the Vacation, before the Day of Appearance appointed for the Jury by the Court above, into the County where

(a) Coke 4. Instit. p. 159. et seq.

where the Action was laid, for the Ease of the Plaintiff, Defendant, Jury and Witnesses, to be tried there, which is usually done in two or three Days: The Verdict of the Jury must thereafter be returned to the Court above, and the Judges there give Judgment for the Party for whom the Verdict is found.

Wherefore all that the Judges of *nisi prius* do in Civil Cases, is to oversee the Jury's giving their Verdict; but as the Suit was contested before the Judges in *Westminster-hall*, so they, on the Return of the Verdict, give Judgment thereon. Is there any Thing similar betwixt that Method of Procedure, and that proposed in the Bill? The Court of Session, which we may call the Court above, is by this Plan to have no Concern at all in Suspensions of Decrees before inferior Judges, first or last, unless the Judges of the Circuit think fit to refer the same to them. The absolute Disparity betwixt their Method of Proceedings in *England* in Civil Cases, and ours, makes it impossible, without Breach of our Constitution, to invest the Judges of the Circuit with any Power in Civil Cases, parallel to that of the Justices of *nisi prius*, in Cases of Trials of Facts by Juries, as the Course is in *England*: The same on a Proof by Witnesses, as well as the Points of Law are tried by the Lords of Session, who at such Trial may be Fifteen, if all are present, and at the least there must be Nine, that being a *Quorum*; these learned Judges, to be sure, are as much to be trusted, even in advising

advising the Proof taken in a Cause, as a Jury of illiterate Country Men. Now 'tis the Privilege of all the People of *Scotland* to have their Actions and Causes, in all Civil Cases, tried before the Court of Session, as the highest subordinate Court, under that of the last Resort, as it is the Privilege of the People of *England* to have the Fact in their Suits tried by a Jury of Twelve, *liberos et legales homines patriæ*, and to withdraw any Causes from the Cognizance of the Court of Session in the second Instance, *i. e.* in the Case of Review of Decrees of inferior Judges, by Way of Suspension or Reduction, is as much against our Constitution, as it would be against that in *England*, to deny the Suitors there a Trial by a Jury.

OBSERV. VI.

That the Tendency of this Bill is to undermine our Constitution, and advance the Jacobite Interest.

UPON the whole, this Bill, as to the first Part, might perhaps be acceptable to a Prince, that aspires to absolute Power and arbitrary Government, *viz.* to have all Jurisdiction and Authority lodged in himself, and the Emanations of it precariously to depend on his Pleasure. This might be first tried upon the People of *Scotland*, on the Offer of a Premium to bribe them out of their Rights and Liberties, for such,

to

to be sure, the Jurisdictions in question are; and if it succeeded, then the like Project might easily be accomplished in *England*, in order to make the Union more complete, that so there might be an Uniformity over all *Britain*. And as above noticed, I suspect the Enemies of our Constitution to be the Promoters of this Bill; for as it was the attempting of absolute Power that was the Rock on which the late King *James* split, so they justly conceive, that the same might be the Case of his present Majesty, if Measures tending that Way shall be followed; but 'tis not doubted, the Wisdom of the Parliament will apprehend the Danger, and prevent it. 'Tis absolutely certain, our most gracious Sovereign has always governed according to the Laws of the Kingdom, and shown himself, upon all Occasions, a strenuous Asserter and Protector of the just Rights and Liberties of his Subjects, and cannot possibly countenance such destructive Measures.

The Case once happened in *England*, that the Parliament made an Act, whereby all future Parliaments were useless; but that very despotick Power which the King obtained by Act of Parliament was his Ruin: I mean the Case of *Richard* the second (a); so that where the Rights and Liberties of the Subjects are invaded, tho' by Act of Parliament, it will not

(a) *Rapin's History of England*, Vol. V. Lib. X. page 168, 169. of the Fol. Edit.

not always prevent the terrible Consequences of Proceedings of that Kind. But I am far from suspecting the present *British* Parliament of such Designs; and tho' they were capable of them, it is not to be imagined that his Majesty would concur in Measures having the least Tendency that Way; so that we are perfectly secure against the fatal Effects of this Bill, since it can never pass into an Act; and I heartily join my Wishes with all true *Britons*, Friends to our happy Constitution, that it may never be attempted.

And as to the other Part of the Bill, it proceeds on mistaken Notions of our Constitution; and in attempting to mend it, would encroach upon the same in divers Respects. It could never answer the specious Design but have the contrary Effect; and instead of promoting the Administration of Justice, would greatly retard it, multiply Trouble and Expences to the Lieges, and occasion great Delays to the Execution of Decrees, which it pretends to make more summary and easy; and as the Plan thereby proposed is an evident Infraction of more than one of the Articles of Union, it must in that Respect have proceeded from the same Source, and be of the same fatal Tendency, as the other Part of the Bill, were it become a Law, which 'tis confidently hop'd shall never be the Case.

F I N I S.

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